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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 501

JOHN HEWETT ARTHUR, *Appellant,*

versus

COMMONWEALTH OF VIRGINIA, *Appellee.*

On Appeal from the Supreme Court of Appeals of Virginia

JURISDICTIONAL STATEMENT OF APPELLANT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Constitutional Provisions And Statutes	5
Statement of Case	5
Argument	7
Conclusion	26

Appendix A: Opinion of Virginia Supreme Court of Appeals	27
Appendix B: Opinion of Circuit Court for the County of Campbell	28
Appendix C: Excerpts from Code of Virginia and Virginia Constitution	35

TABLE OF CITATIONS

Cases

Caldwell v. *Commonwealth*, 205 Va. 277, 136 S. E. 2d 798 (1964)	31
Camara v. *San Francisco*, 387 U. S. 523 (1967)	15
Charleston Federal Sav. & Loan Ass'n. v. *Alderson*, 324 U. S. 182 (1945)	2

PAGE

Cooper v. *California*,
386 U. S. 58 (1967) 18

Cooper v. *Commonwealth*,
205 Va. 883, 140 S. E. 2d 688 (1965) 23

Escobedo v. *State of Illinois*,
378 U. S. 478 (1964) 23, 25

Frost & Frost Trucking Co. v. *Railroad Comm'n.*,
271 U. S. 583 (1926) 22

Garrity v. *State of New Jersey*,
385 U. S. 493 (1967) 2, 18, 19, 20, 21, 23

Gideon v. *Wainwright*,
372 U. S. 335 (1963) 24

Harvey v. *State of Mississippi*,
340 F. 2d 263 (1965) 24

Holt v. *United States*,
218 U. S. 245 (1910) 30

Johnson v. *United States*,
333 U. S. 10 (1947) 14, 15

Lee v. *State*,
358 P. 2d 765 (1961) 33

Malloy v. *Hogan*,
378 U. S. 1 (1964) 8

Mapp v. *Ohio*,
367 U. S. 643 (1961) 11, 20

Miranda v. *State of Arizona*,
384 U. S. 436 (1966) 7, 12, 23, 24, 25

People v. *Mallory*,
147 N. W. 2d 66 (1967) 24

Prichard v. *Battle*,
178 Va. 455, 17 S. E. 2d 393 (1941) 32

PAGE

Prucha v. *Dept. Motor Vehicles*,
110 N. W. 2d 75 (1961) 33

Schmerber v. *State of California*,
384 U. S. 757 (1966) 3, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 23, 25, 29, 30, 31

Shumate v. *Commonwealth*,
207 Va. 877, 153 S. E. 2d 243 (1967) 8, 9, 23, 31

Standard Oil Co. of California v. *Johnson*,
316 U. S. 481 (1942) 2

State v. *Bock*,
328 P. 2d 1065 (1958) 33

Swingle v. *United States*,
151 F. 2d 512 (1945) 30

Ullmann v. *United States*,
350 U. S. 422 (1956) 30

Union Pac. R. Co. v. *Public Service Commission*,
248 U. S. 67 (1918) 19

Walton v. *City of Roanoke*, 204 Va. 678, 133 S. E. 2d 315 (1963) 8, 9, 20, 31, 32, 33

Wolf v. *People of State of Colorado*,
338 U. S. 25 (1949) 11

Wong Sun v. *United States*,
371 U. S. 471 (1963) 15

CONSTITUTIONS

United States Constitution

Fourth Amendment 3, 4, 10, 11, 13, 14, 16, 17, 18, 19, 31

Fifth Amendment 3, 4, 8, 9, 17, 18, 24, 25, 29, 30, 31

PAGE

Sixth Amendment 4, 23, 24, 25

Fourteenth Amendment 3, 4, 8, 10, 11, 14, 17, 18, 19, 20, 23, 29

Virginia Constitution of 1902
Section 8 .....3, 8, 31, 35, 41

STATUTES

Virginia Code Annotated
Section 8-67.1 (Cum. Supp. 1966) 33, 35
Section 18.1-54 (1960 Repl. Vol.) 2, 3, 28, 36, 37, 41, 44
Section 18.1-55.1 (Cum. Supp. 1966) 3, 4, 5, 8, 10, 14, 16, 17, 18, 28, 32, 33, 36, 44
Section 18.1-59 (Cum. Supp. 1966) 3, 5, 28, 43
Section 18.1-58 (Cum. Supp. 1966) 44
Section 19.1-83 (1960 Repl. Vol.) 3, 6, 44
Section 19.1-85 (1960 Repl. Vol.) 44
Section 19.1-90 (1960 Repl. Vol.) 3, 6, 45

United States Code
Title 28, Section 1257 (2) 2

OTHER AUTHORITIES

7 Am. Jur. 24, "Automobiles and Highway Traffic," § 10, p. 603 32

60 C. J. S., "Motor Vehicles," § 146, P. 439..... 32

Sharon Green, Note, 14 U.C.L.A. Law Review 687 (1967) 9

William W. VanAlstyne, "The Demise Of The Right-Privilege Distinction In Constitutional Law," 81 Harv. L. Review 1439, (1968) 22, 23

L. Poindexter Watts, "Some Observations On Police-Administered Tests For Intoxication," 45 North Carolina Law Review 34 (1966) 14

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No. ———

JOHN HEWETT ARTHUR, *Appellant*,

versus

COMMONWEALTH OF VIRGINIA, *Appellee*.

On Appeal from the Supreme Court of Appeals of Virginia

JURISDICTIONAL STATEMENT OF APPELLANT

OPINIONS BELOW

The order of the Supreme Court of Appeals of Virginia, handed down June 12, 1968, rejecting petition and refusnig writ of error and supersedeas appears as Appendix A of this statement (*infra*, p. 27). The opinion of the Circuit Court of Campbell County, Virginia, overruling appellant's motion to set aside the jury's verdict, entered September 26, 1967, is unreported but it appears as Appendix B (*infra*, p. 28).

JURISDICTION

I.

The proceeding below was instituted by the appellee on its own behalf. The proceeding sought a criminal conviction of appellant for operating his automobile under the influence of intoxicants in violation of *Va. Code Ann.* § 18.1-54 (1960 Replacement Volume).

The appellant is a resident, citizen, taxpayer and voter of Campbell County of the Commonwealth of Virginia.

The appellant sought in the proceedings below to suppress the evidence.

II.

The jugment of the Supreme Court of Appeals of Virginia (Appendix A, *infra*, p. 27) was entered June 12, 1968.

Notice of Appeal from said judgment was filed in the Circuit Court for the County of Campbell on August 2, 1968.

III.

Jurisdiction of this appeal is believed to be conferred on this Court by Title 28, U. S. C., § 1257 (2), claiming a right under the United States Constitution, and asserting the invalidity of state statutes, i. e., attacking the statutes themselves as unconstitutional.

IV.

Jurisdiction of this appeal is believed to be sustained by the cases of *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481; *Charleston Federal Sav. & Loan Ass'n.* v. *Alderson*, 324 U. S. 182; and *Garrity* v. *State of New Jersey*, 385 U. S. 493.

V.

Involved in this appeal are § 18.1-54, § 18.1-55.1, § 18.1-59, § 19. 1-83 and § 19.1-90 of the Code of Virginia, and § 8 of the Constitution of Virginia, all of which appear in Appendix C to this statement.

QUESTIONS PRESENTED

The appellant raises the following questions, all of which he maintains should be answered by this Court in the affirmative:

I.

Does admission in evidence of the result of the chemical analysis of a sample of the appellant's blood taken pursuant to Va. Code Ann. § 18.1-55.1 (Cum. Supp. 1966) violate his privilege against self-incrimination guaranteed to him by the Fifth and Fourteenth Amendments of the Constitution of the United States, which privilege protects an accused from being compelled to testify against himself or otherwise provide the State with evidence of a testimonial or communicative nature?

II.

Did the taking of the blood sample from the appellant pursuant to *Va. Code Ann.* § 18.1-55.1 (Cum. Supp. 1966) constitute an unreasonable search and seizure in contravention of the Fourth and Fourteenth Amendments of the Constitution of the United States, in that, unlike *Schmerber* v. *State of California,* 384 U. S. 757, 86 S. Ct. 1826 (1966), the withdrawal of appellant's blood was in other than a medical environment, in the privacy of the station house, in the absence of an emergency, and under conditions that might invite an unjustified element of personal risk of infection and

pain, and especially in view of numerous reasonable alternatives so that the State will not be handcuffed in controlling drivers under the influence?

III.

Did the taking of the blood sample from the appellant pursuant to *Va. Code Ann.* § 18.1-55.1 (Cum. Supp. 1966) violate appellant's Fourth and Fourteenth Amendment rights in that, despite the presence of a neutral and detached magistrate, the presence of the arresting officer capable of filing an affidavit reasonably describing the objective of the search, and the absence of an emergency situation, no search warrant was issued?

IV.

Do the provisions of the Virginia "implied consent" statute (*Va. Code Ann.* § 18.1-55.I [Cum. Supp. 1966]) impose unconstitutional conditions, i. e., condition the appellant's privilege to operate a motor vehicle upon the waiver of appellant's Fourth, Fifth and Fourteenth Amenment rights, or permit the State to bargain for waiver of a right that conflicts with policies implicit in the Constitution, in that the "choice" available to the appellant, between submitting to the blood test on the one hand, or making himself *prima facie* liable for a ninety-day suspension of his driving privileges for the refusal to take the test on the other hand, is not a free and rational choice but one that was infected by the coercion inherent in the statute and cannot be sustained as voluntary?

V.

Were the appellant's Sixth and Fourteenth Amendment rights violated in that during the custodial interrogation he was denied the assistance of counsel since appellant was subjected to many disadvantages and consequences notwithstand-

ing the fact that the crime of which he is accused is a misdemeanor and not a felony?

CONSTITUTIONAL PROVISIONS AND STATUTES

Relevant provisions of the Virginia Constitution and of the Virginia Code appear in Appendix C.

STATEMENT OF CASE

The judgment of the Supreme Court of Appeals of Virginia in this cause affirmed a judgment of the Circuit Court of Campbell County, entered on a verdict of a jury, against the appellant fixing his punishment at a fine of $200.00. As an additional penalty by operation of law (*Va. Code Ann.* § 18.1-59 Cum. Supp. 1966), appellant upon conviction is subject to be deprived of the right to drive any vehicle in this State for a period of one year from the date of such judgment.

After unsuccessful challenges in the courts of Virginia, it, therefore, remains a virtual certainty that no substantial correction of the invidious and unconstitutional application of the Virginia "Implied Consent" Statute can be achieved without further judicial action. Appellant seeks to have this Court set aside the judgment and declare §18.1-55.1 and § 18.1-59 of Article 6, Chapter 2, Title 18.1 of Code of Virginia (Cum. Supp. 1966) unconstitutional.

On September 16, 1966, State Trooper L. N. Walden arrested the appellant, John Hewett Arthur, for driving under the influence and reckless driving on Secondary Route 696 in Campbell County, Virginia. The appellant, who is a farmer and depends on his motor vehicle operator's license to enable him to deliver his produce to markets, was then told that he was being placed under arrest.

Trooper Walden transported the appellant to the County

Jail at Rustburg, and, during the course of the trip, explained to the appellant about the blood test laws; told him when a person operates a motor vehicle on the highway in the State of Virginia, the operation itself was a conditional agreement whereby, if they were arrested for driving under the influence, they would consent to have samples of blood drawn for chemical tests to determine alcoholic contents thereof. At Rustburg, the Deputy Clerk of the County Court (who is so empowered by *Va. Code Ann.* 1960 Repl. Vol., § 19.1-90) wrote the warrant, which the Trooper swore to, charging the appellant with operating under the influence and reckless driving.

The arrest was made at 12:30 o'clock P. M. and the blood was extracted at 1:21 o'clock P. M. on the same day. No search warrant was requested or issued since Trooper Walden thought that none was required, although he stated that it would not have been any trouble to get somebody to issue one. Trooper Walden further testified that someone was available to issue a warrant of arrest or search warrant or any other process that was appropriate under the circumstances. (*Va. Code Ann.*, 1960 Repl. Vol., § 19.1-83). The appellant was suffering from no unusual medical condition, such as an injury, and no emergency condition existed which required hospital care or first aid.

Although Trooper Walden testified that the appellant requested the assistance of a specific attorney, Thomas L. Phillips, he could not recall whether or not this request took place before or after the blood was extracted. On the other hand, the appellant testified, in chambers, that he called for Mr. Phillips before the blood was extracted. The appellant was told that the attorney's office had been called but that the attorney was out. He was then told that the attorney was called again and that he was in court. It later turned out that the attorney was in court within one hundred yards of the place where the appellant was being interrogated. After the unsuccessful attempt to reach Mr. Phillips, the appellant was not offered counsel by anyone else, although an

attempt was made to get the persons specifically requested by the appellant. The appellant testified that when he was stopped by Trooper Walden he was nervous and upset and had difficulty finding his operator's license. Trooper Walden then "shook me down, my pockets, like I might have had a gun." He was taken to the jail at Rustburg, Virginia and at that time, he was still physically nervous and upset.

After the hearing on the motion to suppress the evidence of the blood test, which was heard in chambers, counsel for the appellant were offered the opportunity to present additional grounds for the consideration of the trial court. At this point, counsel for the appellant asserted that the requirements set down in the case of *Miranda* v. *State of Arizona,* 384 U. S. 436, 86 S. Ct. 1602 (1966), were not complied with. The trial court then overruled the motion to suppress evidence on all points and the case was tried before the jury.

The Circuit Court found that the requirements of Virginia's "Implied Consent" Statute, as construed by it, meet the requirements of the Virginia Constitution and the Constitution of the United States. The Circuit Court further found that in no stages of the arrest, interrogation, search or seizure were any of appellant's Constitutional rights infringed. It is, of course, the contention of appellant that he was denied due process of law upon his conviction in the Circuit Court of Campbell County on September 19, 1967 (as affirmed by Supreme Court of Appeals of Virginia on June 12, 1968), and that the present administration of Virginia's "Drunk Driving" Statute cannot stand when reasonable and efficient alternatives to keep such drivers from the highways presently exist.

ARGUMENT

I.

DOES ADMISSION IN EVIDENCE OF THE RE-

SULT OF THE CHEMICAL ANALYSIS OF A SAMPLE OF THE APPELLANT'S BLOOD TAKEN PURSUANT TO *VA. CODE ANN.* § 18.1-55.1 (CUM. SUPP. 1966) VIOLATE HIS PRIVILEGE AGAINST SELF-INCRIMINATION GUARANTEED TO HIM BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES WHICH PRIVILEGE PROTECTS AN ACCUSED FROM BEING COMPELLED TO TESTIFY AGAINST HIMSELF, OR OTHERWISE PROVIDE THE STATE WITH EVIDENCE OF A TESTIMONIAL OR COMMUNICATIVE NATURE?

At present, the law in Virginia is that admission in evidence of reports of blood analysis in a drunk driving case does not violate the defendant's constitutional right against self-incrimination under Article 1, §8, of the Virginia Constitution, or the Fifth Amendment to the United States Constitution. *Shumate* v. *Commonwealth,* 207 Va. 877, 153 S. E. 2d 243, (1967); *Walton* v. *City of Roanoke,* 204 Va. 678, 133 S. E. 2d 315 (1963). These two cases concluded that the prohibition against compelling one in a criminal case to give evidence against himself is restricted to oral testimony and does not preclude the use of one's body or secretions therefrom and the result of their chemical analysis.

In *Schmerber* v. *State of California,* 384 U. S. 757, 86 S. Ct. 1826 (1966), the Supreme Court of the United States, in a five to four decision, considered the issue of whether or not a blood analysis taken in connection with a drunk driving statute for use against the defendant violated the defendant's Fifth Amendment privilege of not being compelled to be a witness against himself. The Court noted that in the case of *Malloy* v. *Hogan,* 378 U. S. 1 (1964), the same safeguards available to the defendant under the Fifth Amendment in a federal proceeding are now likewise applicable to defendants in state proceedings under the Fourteenth Amendment of the Constitution of the United States. Despite the defendant's refusal to submit to the blood test, the Court

held "that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature". 384 U. S. at 761.

The four dissenting justices stressed that the distinction drawn by the majority opinion between "physical evidence" and evidence of a testimonial or communicative nature is unrealistic and that the facts in *Schmerber* did violate defendant's Fifth Amendment privilege against self-incrimination.

It is further to be noted that since the decision in *Schmerber*, one of the justices who comprised the five-man majority has retired from the Court and it is only logical to assume that the holding of the majority in *Schmerber* will be challenged again with the strong likelihood of a different result.

It is also submitted by the appellant that the distinctions drawn in the *Schmerber* case; *Shumate* v. *Commanwealth, Supra;* and *Walton* v. *City of Roanoke S,upra,* are unrealistic. It cannot be seriously denied that the appellant's blood was withdrawn for the sole purpose of introducing the results of the test of that blood against him in a criminal prosecution and it is difficult to perceive how this could be any less "testimonial or communicative" than it would be if the appellant had taken the stand and fully admitted his guilt. Moreover, under the statute, an accused can be found guilty on the strength of the blood test alone.

According to Sharon Green's Note in *UCLA Law Review,* Vol. 14, page 687, 1967:

> The policy behind the privilege against self-incrimination is twofold: it eliminates coercion as an instrumentality of law enforcements, and encourages police and prosecutors to procure evidence against the accused as the result of their independent efforts.

Appellant submits that, based on this policy, the reasonable and efficient alternatives available, (i. e. the Drunkometer, the Breathalyzer, the Photo-Electric Intoximeter, and others to be presented below in Argument II), for the Court to hold that admission in evidence of the results of the blood test does violate appellant's privilege against self-incrimination will in no way handcuff the State in controlling and prosecuting drunk drivers. Therefore, the appellant respectfully submits that the admission of evidence of the analysis of his blood sample violates his constitutional privilege against self-incrimination.

II.

DID THE TAKING OF THE BLOOD SAMPLE FROM THE APPELLANT PURSUANT TO *VA. CODE ANN.* § 18.1-55.1 (CUM. SUPP. 1966) CONSTITUTE AN UNREASONABLE SEARCH AND SEIZURE IN CONTRAVENTION OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES, IN THAT UNLIKE *SCHMERBER* V. *STATE OF CALIFORNIA,* 384 U. S. 757, 86 S. Ct. 1826 (1966) THE WITHDRAWAL OF APPELLANT'S BLOOD WAS IN OTHER THAN A MEDICAL ENVIRONMENT, IN THE PRIVACY OF THE STATION HOUSE, IN THE ABSENCE OF AN EMERGENCY, AND UNDER CONDITIONS THAT MIGHT INVITE AN UNJUSTIFIED ELEMENT OF PERSONAL RISK OF INFECTION AND PAIN, AND ESPECIALLY IN VIEW OF NUMEROUS REASONABLE ALTERNATIVES SO THAT THE STATE WILL NOT BE HANDCUFFED IN CONTROLLING DRIVERS UNDER THE INFLUENCE?

In *Schmerber* v. *State of California, Supra,* the question of whether or not the withdrawal of blood for criminal analysis without the consent of the accused, constituted an

illegal search and seizure in contravention of the Fourth Amendment of the United States Constitution was squarely presented. The Fourth Amendment provides in pertinent part as follows: "the right of the people to be secure in their *persons,* * * * against unreasonable searches and seizure shall not be violated * * *". (Emphasis added). As the majority opinion stated in *Schmerber,* "the overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." 384 U. S. at 767. The security of one's privacy against arbitrary intrusion by the police is at the core of the Fourth Amendment and is basic to a free society. *Wolf* v. *People of State of Colo.,* 383 U. S. 25, 69 S. Ct. 1359.

This broad view of the Fourth Amendment was made directly applicable to the states in the case of *Mapp* v. *Ohio,* 367 U. S. 643,81 S. Ct. 1684 (1961), which made the federal exclusionary rule directly applicable to the states through the Fourteenth Amendment of the United States Constitution. This rule, of course, excludes any evidence in a state criminal proceeding which was obtained as a result of an illegal search and seizure and superseded the old evidentiary rule that "evidence is evidence" no matter how obtained.

The defendant in the *Schmerber* case expressly refused to submit to the extraction of his blood and the blood was withdrawn over his objection. In the instant case, there was no express refusal by the appellant to allow the withdrawal of his blood. Under these facts, the written opinion of the trial court (Appendix B, *infra,* p. 28) places great emphasis on the fact that the appellant "voluntarily" submitted to the blood test and distinguishes the *Schmerber* case on these grounds. It is submitted that the word "voluntary" implies that the appellant freely, knowingly, intelligently, and without duress or compulsion, submitted to the extraction of his blood. The circumstances under which his blood was drawn negates this concept of voluntariness. The appellant was arrested by the Trooper who asked to see his driving permit.

At this point, the appellant was nervous and upset. Appellant was upset by the fact that the Trooper had pulled him over and, in fact, the Trooper "shook me down my pockets, like I might have had a gun". On the way to the jail, the appellant was specifically told that "when a person operates a motor vehicle on the highway in the State of Virginia, the operation itself was a conditional agreement whereby, if they were arrested, for driving while under the influence, they would consent to have samples of blood drawn for chemical test to determine alcoholic contents thereof". The appellant asked for his attorney before the blood was extracted from him. The attorney was not located and the blood was then extracted. The fact that the appellant was in the custody of the Trooper from the time he was arrested, was searched for any possible weapon he may have had, was taken in the Trooper's automobile to the confines of a jail and told that he had already "consented" to the taking of his blood by the mere fact of operating his motor vehicle on a highway of the State of Virginia, had attempted to contact an attorney of his choice unsuccessfully, prior to the taking of the blood, appears to fly fully in the face of any definition of voluntariness in any true sense of the word. See *Miranda* v. *State of Arizona,* 384 U. S. 436, 86 S. Ct. 1602 (1966).

One further point was presented in the *Schmerber* case. Though the record showed that the blood test was performed in a reasonable manner, *Schmerber's* blood was taken by a physician in a hospital environment, according to accepted medical policies. The Court stated that they were not presented with the "serious questions" which would arise if a search involving use of a medical technique, even of the most rudimentary sort, was made by other than medical personnel "or in other than a medical environment — for example, if it were administered by police in the privacy of the station house. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain". 384 U. S. at 771, 772.

The fact that the test conducted in the instant case took place in the jail at Rustburg, Virginia, with no medical personnel present other than a registered nurse who lives in the community and who conducted the test with equipment which is maintained and kept at the jail, comes very close to the admonition of the Supreme Court in *Schmerber*. Although there is no direct evidence which tends to show "an unjustified element of personal risk of infection and pain", the appellant submits that, in the instant case, the Trooper could just as easily have taken the appellant to a hospital for the administration of a blood test. The place and conditions under which the blood test was actually administered fall within the purview of the language in *Schmerber* and, for those reasons alone, the administration of the blood test in the instant case is *per se* unreasonable.

The Court in *Schmerber* said, " . . . (T)he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner". (384 U. S. at 768). Appellant submits that the facts of the instant case present the circumstances and improper manner that the Court had in mind to be unreasonable, or at least require a search warrant. Appellant asks that this Court limit *Schmerber* to its special facts and not extend it beyond the facts of the instant case.

If these actions are taken, it is submitted that the State will not be "hand-cuffed" in controlling and prosecuting drunk drivers. There are available today numerous methods for accurate measuring of alcoholic content that are reasonable methods, and are certainly not as unreasonable to physical integrity as the "pricking of the skin" in a jail house. Some of the alternatives available to the State which have been proven accurate and reliable are: Use of Visual and Sound Recordings; Chemical Analysis of Urine; Chemical Analysis of the Breath: The Drunkometer, The Alcometer, The Portable Intoximeter, The Breathalyzer, The Photo-Electric Intoximeter, The DPC Intoximeter, The Breath-Tester, and

The Kitagawa-Wright Apparatus. Most of these devices are portable, inexpensive, have the virtue of being usable in the field (minimizing the lapse of time problem), operate with precision and accuracy, and do not require any special skill to operate. Some of the apparatus capture back-up samples for later chemical analysis against any question of instrument or operator error. See generally, Professor L. Poindexter Watts, "Some Observations On Police-Administered Tests For Intoxication", 45 *North Carolina Law Review* 34 (1966).

III.

DID THE TAKING OF THE BLOOD SAMPLE FROM THE APPELLANT PURSUANT TO *VA. CODE ANN.* § 18.1-55.1 (CUM. SUPP. 1966), VIOLATE APPELLANT'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS IN THAT, DESPITE THE PRESENCE OF A NEUTRAL AND DETACHED MAGISTRATE, THE PRESENCE OF THE ARRESTING OFFICER CAPABLE OF FILING AN AFFIDAVIT REASONABLY DESCRIBING THE OBJECTIVE OF THE SEARCH, AND THE ABSENCE OF AN EMERGENCY SITUATION, NO SEARCH WARRANT WAS ISSUED?

The *Schmerber* case recognized that the withdrawal of blood under circumstances similar to those presented in the instant case constitutes a search and seizure involving an intrusion beyond the body's surface. The Court noted that search warrants are ordinarily required for searches of dwellings, and absent an emergency no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime". *Johnson* v. *United States,* 333 U. S. 10. The

Court stated at 384 U. S. at 770: "The importance of informed, detached determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great".

Having recognized that the withdrawal of blood constituted a search and seizure which required the issuance of a search warrant, the Court concluded, howeve,r that an emergency situation existed in the *Schmerber* case in which the police officer might have reasonably believed that the delay which would have been occasioned by the procedure of obtaining a search warrant threatened the destruction of the evidence. The Court, under these special facts, concluded that the attempt to secure evidence of blood alcohol content was an appropriate incident to arrest. In the instant case, the uncontradicted testimony of Trooper Walden established that no search warrant was issued, that no such warrant was requested by the Trooper and, indeed, he thought that none was required. Trooper Walden further testified that an issuing officer was readily available to issue the search warrant and that it would not have been any trouble to have one issued.

Trooper Walden further testified that the appellant was not injured, that he required no immediate medical attention or hospital care and there were no other unusual medical conditions present. In short, it is readily apparent that no "emergency" existed which was so vital to the decision in *Schmerber*. It is submitted that in the instant case, the Trooper was required to present his estimate of probable cause for the detached scrutiny by a neutral magistrate. In the absence of the "emergency" situation existing in *Schmerber*, the Constitution requires "that the deliberate impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *." *Wong Sun* v. *United States*, 371 U. S. 471, 83 S. Ct. 407 (1963).

In *Camara* v. *San Francisco*, 387 U. S. 523, 87 S. Ct. 1727, the Court held that administrative searches of buildings to enforce fire, health and building codes were:

> . . . significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual . . .
>
> * * *
>
> The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But unreasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. Such an approach neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area. It merely gives full recognition to the competing public and private interests here at stake and, in so doing, best fulfills the historic purpose behind the constitutional right to be free from unreasonable government invasions of privacy . . .

Appellant respectfully submits that a man's body is more sacred than his home, and thus, further submits that the blood sample taken from him was in violation of his Fourth Amendment rights.

IV.

DO THE PROVISIONS OF THE VIRGINIA "IMPLIED CONSENT" STATUTE (*VA. CODE ANN.* § 18.1-55.1 [CUM. SUPP. 1966]) IMPOSE UNCONSTITUTIONAL CONDITIONS, I. E., CONDITION THE APPELLANT'S PRIVILEGE TO OPERATE A MOTOR VEHICLE UPON THE WAIVER OF APPELLANT'S

FOURTH, FIFTH AND FOURTEENTH AMENDMENT RIGHTS, OR PERMIT THE STATE TO BARGAIN FOR WAIVER OF A RIGHT THAT CONFLICTS WITH POLICIES IMPLICIT IN THE CONSTITUTION IN THAT THE "CHOICE" AVAILABLE TO THE APPELLANT, BETWEEN SUBMITTING TO THE BLOOD TEST ON THE ONE HAND, OR MAKING HIMSELF *PRIMA FACIE* LIABLE FOR A 90 DAY SUSPENSION OF HIS DRIVING PRVILEGES FOR THE REFUSAL TO TAKE THE TEST ON THE OTHER HAND, IS NOT A FREE AND RATIONAL CHOICE BUT ONE THAT WAS INFECTED BY THE COERCION INHERENT IN THE STATUTE AND CANNOT BE SUSTAINED AS VOLUNTARY?

A question remains whether or not the appellant "consented" to the taking of the blood from his body. This issue is, of course, closely connected with the question of "voluntariness" which is relied on by the trial court in its written opinion (Appendix B, *infra* p. 28) and is also a vital part of *Va. Code Ann.* 18.1-55.1 [Cum. Supp. 1966] which, in essence, provides that the appellant had given his consent, by implication, by the mere fact of operating his motor vehicle on the highways of the State. It is important to bear in mind that if the appellant had not "consented" as decided by the trial court, he would have been subjected to a penalty of having his privilege to operate a motor vehicle suspended for 90 days for the unreasonable refusal to take a blood test. *Va. Code Ann.* § 18.1-55.1, *supra.* In other words, the appellant by asserting his right to have a search warrant issued prior to the extraction of his blood, in the absence of an emergency situation, in accordance with the *Schmerber* case, subjects himself to a penalty imposed by the State for asserting this right. It is submitted that this fact makes a serious inroad on the finding by the trial court that the appellant "consented" to the extraction of his blood as a matter of fact. On the other hand, it is plausible to say, and the appellant so submits, that he had little choice as a matter of fact, other than to take the blood test.

It will be argued by the Commonwealth that the question of whether or not the appellant consented in fact to the taking of his blood is of no consequence in light of the fact that the law, as written, states that he has consented, in advance, by implication, by the operation of his motor vehicle on a State highway. This argument conveniently overlooks the fact that the appellant is entitled to his personal right to be free from illegal searches and seizures. This right is guaranteed to him by the Fourth Amendment of the United States Constitution and this right is dramatically emphasized in the *Schmerber* case. Moreover, states should not be free to water down by legislation rights guaranteed by the constitution. *Cooper* v. *California,* 386 U. S. 58 (1967). It is submitted that the appellant's Fourth Amendment rights are in conflict with the "implied consent" provision of the state statute. The Commonwealth can argue that this conflict is resolved by the fact that the appellant has a "choice" in the matter in that he can refuse to take the blood test. However, by refusing to do so the appellant makes himself amenable to prosecution if this refusal is unreasonable. (§ 18.1-55.1 [m] provides the fact of refusal to be prima facie unreasonable). This choice places the appellant under duress and leaves him with a decision "between the rock and the whirlpool." *Garrity* v. *State of New Jersey,* 385 U. S. 493, 87 S. Ct. 616 (1967). In the *Garrity* case the appellant gave testimony concerning the fixing of traffic tickets in the police department in certain boroughs in the State of New Jersey. The appellant was confronted with a statute which allowed him to refuse to testify, but, if he did not he was subject to removal from office for his failure to do so. This case involved the appellant's Fifth Amendment privilege aganist self-incrimination and the Court stated the issue to be the fear of being discharged under the New Jersey statute for refusal to answer on the one hand and the fear of self-incrimination on the other. The Court said that this was "a choice between the rock and the whirl-pool" which made the statements products of coercion in violation of the Fourteenth Amendment. The Court concluded that the State of New Jersey, contrary to

the requirement of the Fourteenth Amendment, cannot use the threat of discharge to secure incriminatory evidence against an employee and that policemen are not relegated to a watered-down version of constitutional rights. The Court went on to state that the pressures exerted against the appellant under the New Jersey Statute prevented him from making a free and rational choice and that, consequently, the confession of the police officer was infected by coercion and was therefore involuntary. The State argued in the *Garrity* case that the police officers had made a "waiver." This argument was dismissed by the Supreme Court on the grounds that duress was inherent in the choice available to the police officers. The Court quotes with approval the language in *Union Pac. R. Co.* v. *Public Service Commission,* 248 U. S. 67, as follows:

> Were it otherwise, as conduct under duress involves a choice, it always would be possible for a state to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept, and then to declare the acceptance voluntary * * *
>
> It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.

The lesson to be learned from the *Garrity* case is clear. The "implied consent" statute, as written, presents the appellant with a choice. This choice, however, is a choice between two evils as contemplated in *Garrity*. The statute attempts to legislate away the appellant's right to be free from illegal searches and seizures. As *Garrity* clearly demonstrates, this the state cannot do since it attempts to water-down the appellant's rights guaranteed to him by the Fourth Amendment and made applicable to the states through the Fourteenth Amendment of the United States Constitution.

The standard argument in favor of the provision of the "implied consent" statute, which makes the consent to a blood test a prior condition to the operation of a motor vehicle upon the highways of the State, is that this right to operate a motor vehicle is not a property or unrestrained right, but a privilege which is subject to reasonable regulations under the police power of the State in the interest of public safety and welfare. *Walton* v. *City of Roanoke, Supra.* It does not follow, however, that unreasonable searches and seizures are "reasonable regulations" under the police power of the State.

The *Schmerber* case now says that it is unreasonable under non-emergency conditions to extract blood from a defendant, absent his consent, without the prior issuance of a search warrant with its attendant procedural safeguards. This decision is, of course, binding on the states through the Fourteenth Amendment. *Mapp* v. *Ohio, Supra.*

The argument that the appellant consented in fact or voluntarily submitted to the blood test has been rebutted above. In addition, the "choice" available to the appellant between submitting to the blood test on the one hand and making himself *prima facie* liable for a 90 day suspension of his driving privileges for the refusal to take the test on the other hand makes this choice an illusion because of the inherent duress involved. *Garrity* v. *State of New Jersey, Supra.* As in *Garrity,* the finding of the trial court that the choice to take the test by the appellant was "voluntary" disregards the fact that this choice was not a free and rational choice but one that was "infected by the coercion inherent" in the statute and cannot be sustained as voluntary.

The appellant is well aware of the established reasoning that the operation of a motor vehicle on the highways of this State is not a "right," but a "privilege." However, it has been heretofore pointed out that the states are not free to inact legislature which will water-down or infringe upon rights guaranteed under the United States Constitution.

Moreover, the *Garrity* case provides a vivid answer to this "right" versus "privilege" argument. In *Garrity*, the appellants were police officers of the State of New Jersey whose jobs existed by the grace of the State. It is certainly logical to say that these jobs were given to men who were privileged enough to have the necessary qualifications and that these men had no "right," by any stretch of the imagination, to these jobs. The statute in question in *Garrity* was a statute designed for making inquiries for the purpose of regulating and investigating practices of public employees. Yet, in the face of all this, the Supreme Court held that the police officers in *Garrity* were entitled to assert their individual constitutional rights and that these rights are not to be watered-down by the State.

The attempt by the State of New Jersey to regulate their public employees by the statute in question was done in the name of the police power of the State, but the Supreme Court did not allow this fact to override individual rights. It is submitted that the State of New Jersey had at least as much interest in the regulation of its police force as the State of Virginia has in the regulation of the operation of motor vehicles on its highways. It is further submitted that the appellant has at least as much "right" to operate his vehicle on the highways of the State as Mr. Garrity had to be a policeman in the State of New Jersey. The *Garrity* case is authority for the abolition of the distinction between a right and a privilege insofar as the balancing of state police power against individual constitutional rights is concerned. As stated by Mr. Justice Sutherland:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold . . . If the state may compel

> the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence. *Frost & Frost Trucking Co. v. Railroad Comm'n.*, 271 U. S. 583, 593-94 (1926).

Professor VanAlstyne, commenting on Mr. Justice Sutherland's statement, writes:

> Essentially, this doctrine declares that whatever an express constitution provision forbids governments to do directly it equally forbids governments to do indirectly. * * *
>
> The unconstitutional conditions doctrine has been applied, for example, to forbid a state to discontinue unemployment benefits to a person refusing Saturday employment for religious reasons. And it has been employed to protect the status of state college students from summary termination, against the argument that the privilege of attendance had been conditioned upon their acceptance of a rule permitting summary dismissal. The doctrine would appear to apply equally well to every other case where the enjoyment of a government-connected interest is conditioned upon a rule requiring that one abstain from the exercise of some right protected by an express clause in the Constitution. Literal application of the doctrine might mean, for instance, that a welfare recipient need not consent (and cannot be held by his economically coerced consent) to a warrantless search of his lodgings absent circumstances otherwise justifying an equivalent administrative search of private premises occupied by one not on welfare. It would also suggest that a policeman can no more be made to waive his privilege against self-incrimination than can a private at-

torney. Van Alstyne, "The Demise Of The Right-Privilege Distinction in Constitutional Law," 81 *Harv. L. Rev.* 1439, 1445-1447 (1968).

The decisions in *Schmerber* v. *State of California* and *Garrity* v. *State of New Jersey, Supra,* now cast grave doubt on the constitutionality of the Virginia "implied consent" statute and on the constitutionality of the blood test taken in the instant case. The appellant submits that the statute seeks to infringe upon the rights guaraneted to him by the Constitution of the United States and as these recent cases point out, the conflict thus created, must be resolved in favor of the appellant, and that the "implied consent" provision statute must fall.

V.

WERE THE APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS VIOLATED, IN THAT DURING THE CUSTODIAL INTERROGATION HE WAS DENIED THE ASSISTANCE OF COUNSEL SINCE APPELLANT WAS SUBJECTED TO MANY DISADVANTAGES AND CONSEQUENCES NOTWITHSTANDING THE FACT THAT THE CRIME OF WHICH HE IS ACCUSED IS A MISDEMEANOR AND NOT A FELONY?

In *Shumate* v. *Commonwealth, Supra.,* the question was presented of the right of a defendant to the assistance of counsel in a prosecution for driving under the influence of intoxicants. *Shumate* had relied on *Cooper* v. *Commonwealth,* 205 Va. 883, 140 S. E. 2d 688 (1965). The Court of Appeals reached the conclusion that the *Cooper* case was not applicable under the facts presented. However, the Court did not expressly negate an accused person's right to counsel as laid down in the case of *Miranda* v. *State of Arizona, Supra.* At the outset, the major distinction between the instant case and the questions presented in the *Miranda* case and the case of *Escobedo* v. *State of Illinois,* 378 U. S. 478

(1964) is that none of the United States Supreme Court cases involved a misdemeanor. As far as is known, the precise question of whether or not a defendant is entitled to counsel, as a matter of right, in a misdemeanor case, has not been presented to the United States Supreme Court. However, in principal, this distinction is of little consequence as far as a defendant is concerned. One accused of crime may suffer many disadvantages and consequences notwithstanding the fact that the crime of which he is accused is a felony or a misdemeanor. In fact, a federal court has held that the principal laid down in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), applies to a misdemeanor and that the accused was entitled to have counsel and that the Sixth Amendment of the Constitution of the United States applies to misdemeanors in states courts. *Harvey* v. *State of Mississippi*, 340 F. 2d 263 (5 CCA 1965). In *Harvey*, the accused was an unschooled, unlettered man who pled guilty before a Justice of the Peace on a charge of possession of unlawful whiskey some days before he was sentenced and at his trial was sentenced to serve a term of 90 days in jail and given a fine of $500.00. Counsel was never present. *Harvey* has been cited by the Supreme Court of Michigan in *People* v. *Mallory*, 147 N. W. 2d 66, which expressly holds that a defendant in a misdemeanor case is entitled to counsel if requested.

The *Harvey* case was decided before *Miranda* v. *State of Arizona, Supra*. The *Miranda* case likewise made no distinction between felonies and misdemeanors and did not limit its holding to felony cases. In *Miranda*, in addition to other requirements which the police must comply with for in-custody interrogation, a defendant must be advised that he has a right under the Fifth Amendment to the presence of counsel during interrogation and that, if he is without funds, counsel will be furnished for him. When at any point during an interrogation the accused seeks affirmatively or impliedly to invoke his rights to silence or to counsel, interrogation must be foregone or postponed. The Court further holds that failure in these procedures requires the exclusion of any

statements by the accused, as well as the fruits thereof. In order for an accused to waive these rights, the burden is on the prosecution to affirmatively show that any such waiver is made voluntarily, knowingly and intelligently.

It is to be recalled that the appellant in the instant case was arrested by the Trooper and remained in his custody until the arrival at the jail. The appellant remained at the jail until all questioning and until the taking of his blood had been completed. He specifically asked for his attorney and the evidence shows that this request was made prior to the blood test. Although an attempt was made to reach his attorney, the blood test was administered in spite of the request. It cannot be denied that all proceedings subsequent to the arrest of the appellant were accusatory and not investigatory and, therefore, the right to the assistance of counsel under the Sixth Amendment attached. *Escobedo* v. *State of Illinois, Supra.* The appellant also had the right to counsel under the Fifth Amendment in accordance with the opinion in *Miranda, Supra,* and as the Court indicated in this last mentioned case, the fruits obtained in violation of the appellant's rights as enumerated in the *Miranda* case are not admissible in evidence. Assuming that the blood test result itself is admissible under the holding in *Schmerber, Supra,* the appellant submits that this blood test is a forbidden fruit obtained as a result of the prohibited practices contemplated in the *Miranda* case and thus are not admissible against the appellant.

Therefore, the appellant submits that he was denied the assistance of counsel, specifically requested by him, which counsel was located within 100 yards of the place where the appellant was being interrogated, in violation of the rights guaranteed to him by the Fifth and Sixth Amendments of the United States Constitution and, as a result, the evidence thus obtained from the appellant is constitutionally inadmissible.

CONCLUSION

Appellant, by counsel, respectfully submits that probable jurisdiction should be noted and the case advanced to the argument calendar for full consideration.

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PROOF OF SERVICE

WM. ROSENBERGER, JR.

I, ~~Thomas L. Phillips,~~ Counsel for Appellant, herein, depose and say that on the 9th day of September, 1968, I served copies of the foregoing jurisdictional statement on each of the Counsel for the Appellee herein by mailing copies, via U. S. mail, in duly addressed envelopes with first-class postage prepaid, to their respective offices, ~~or if none, to them personally~~, as follows:

1. On Hon. E. Bruce Harvey, Commonwealth's Attorney of Campbell County, Rustburg, Virginia.

2. On Hon. Robert Y. Button, Attorney General, Commonwealth of Virginia, Richmond, Virginia.

WM. ROSENBERGER, JR.

~~Thomas L. Phillips.~~

APPENDIX A

In the

SUPREME COURT OF APPEALS

For the Commonwealth of Virginia

June 12, 1968

John Hewett Arthur,

Petitioner,

vs.

Commonwealth of Virginia,

Respondent

The petition of John H. Arthur for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Campbell County on the 22nd day of November, 1967, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

/s/ H. G. Turner,

Clerk

APPENDIX B

In the

CIRCUIT COURT

For the County of Campbell

Virginia

Commonwealth of Virginia

vs. *OPINION*

John HewettArthur

FACTS

This case was tried before a jury on September 19, 1967, and resulted in a finding of guilty of operating a motor vehicle while under the influence of intoxicants. The jury fixed punishment at a fine of $200.00. The case is now before me on a motion to set aside the jury verdict on constitutional questions involving admissibility of the blood test results of the accused under the Virginia "Drunk Driving" Statutes. (§ 18.1-54-18.1-59, Code of Virginia, 1950, as amended). Specifically, attorneys for the accused attack the constitutionality of Virginia's "Implied Consent" Statute (§ 18. 1-551) on several grounds. In effect, this statute, as amended by the Virginia General Assembly in 1964 and 1966, provides, among other things, that a person operating a motor vehicle upon a public highway of this state shall be deemed thereby, as a condition of such operation, to consent to a blood test if arrested for drunk

driving. It further provides for an additional penalty of 90 days revocation of license for an unreasonable refusal to submit to such a test after the accused has been advised of his rights under the terms of the statute. Although there was evidence of a violation of the statute aside from the blood test, this Court, after hearing evidence in chambers on the point, admitted the results of such tests into evidence. The tests showed an alcohol blood content by weight of 0.25% and 0.24%. Under Virginia law, if the accused's blood test is 0.15% or more, there is a presumption that he was under the influence of alcoholic intoxicants at the time of the alleged offense.

Counsel for the accused, in his motion to suppress the blood test results and memorandum filed with the Court, argue that the above statutes are unconstitutional on the following grounds:

(1) Requiring an accused to submit to a blood test violates his privilege against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution.

(2) The lack of a search warrant made such test results inadmissible and constituted unreasonable search and seizure.

(3) Rights guaranteed by the Constitution cannot be conditioned by the State Statute.

Other questions raised on the motion to suppress are included in an analysis of the above issues.

LAW

A. *Federal Law*

The most recent Federal case in point is *Schmerber* v. *California,* 384 U. S. 757, 86 S. Ct. 1826, (decided June 20,

1966). In that case, defendant was charged with driving under the influence of intoxicants and a sample of his blood was taken against his will and at the direction of a police officer. He claimed this violated his privilege aganist self-incrimination under the Fifth Amendment, but the Court rejected his claim and held that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.

The defense admits that the *Schmerber* case is against them, but argue that this was a 5-4 decision and "since that time one of the justices who comprised the majority has left the Court and it is quite logical to assume that the holding of the *Schmerber* case will be challenged again with a different result." Certainly, I would not base a decision on what I think the Unted States Supreme Court might do if again faced with the question, but I must base ~~by~~ my conclusions on the law as it now stands. What the Supreme Court might do tomorrow or whether any different decision would be made retroactive is anybody's guess. Other Federal cases bearing on the question are, *Ullman* v. *United States,* 350 U. S. 422, 76 S. Ct. 497; *Holt* v. *United States,* 218 U. S. 245, 31 S. Ct. 2; and *Swingle* v. *United States,* 10 Cir., 151 F. 2d 512.

In the *Schmerber* case, the accused's blood sample was taken *over his objection* while he was in the hospital after arrest. In the case now before us, the accused, Arthur, after having been advised of his rights under the statutes, *voluntarily* submitted to the blood tests and signed a form directing that his sample be sent to a certain laboratory for testing. This is, in my opinion, an important difference in the *Schmerber* case and our case. A careful reading of the *Schmerber* case indicates that it might have been decided differently on the "search warrant" issue if an emergency situation had not existed, for; indeed, the court said that "in absence of emer-

gency, search warrants are required for a search involving intrusion into the human body," U.S.C.A. Const. Amend. 4. In our case, however, the accused, Arthur, had the right to refuse the blood test and "intrusion into his body" but elected to take the test and gamble on the outcome. If he had had as little to drink as he claimed at the trial, taking the test would have proven a sound decision. Having voluntarily taken the test and received an unfavorable result, he cannot now complain that a search warrant was not first obtained anymore so than a homeowner who freely admits investigating officers into his home can complain later that they didn't have a search warrant.

B. *Virginia Law*

The most recent Virginia Supreme Court decision in point is *Shumate* v. *Commonwealth,* 207 Va. 877, 153 S.E. 2d 243 (decided March 6, 1967). This case, citing the *Schmerber* case and affirming a conviction, held that the admission in evidence of reports of blood analysis in a drunk driving case does not violate the defendant's constitutional right against self-incrimination under Article 1, § 8 of the Virginia Constitution, or the Fourth and Fifth Amendments to the United States Constitution. The Court said:

> "It is now settled by the decisions of this court and of the United States Supreme Court that these constitutional guaranties are not violated by such taking of blood."
>
> In *Walton* v. *City of Roanoke,* 204 Va. 678, 681, 133 S. E. 2d 315, 317, we said "The constitutional prohibition against compelling one in a criminal court to give evidence against himself is restricted to oral testimony and does not preculde the use of one's body or secretions therefrom and the result of their chemical analyses. * *" See also *Caldwell* v. *Commonwealth,* 205 Va. 277, 136 S. E. 2d 798. 207 Va. at 880.

It should be noted that our court has made a sharp distinction between self-incrimination protection as to *oral testimony* and *"the use of one's body or secretions therefrom and the result of their chemical analyses."*

In the *Shumate* case, the accused was not advised of his right to counsel following arrest. In the case at bar, the State Trooper allowed the accused to attempt to contact his attorney.

Walton v. *City of Roanoke,* 204 Va. 678, 133 S. E. 2d 315, (1963) raised constitutional issues as to the "implied consent" law then in effect in Virginia. The Virginia Supreme Court of Appeals said in affirming a drunk driving conviction and holding that no constitutional rights of the accused had been violated:

> Moreover, the defendant was not compelled under § 18.1-55 to submit to the blood test. He had a choice of either allowing the test to be made or refusing it. His refusal could not be used as evidence in his trial on the charge of driving under the influence of intoxicants but, if found to be unreasonable, constituted grounds for revocation of the privilege of operating his automobile upon the highways of this State. However, defendant is afforded a hearing on this latter issue subsequent to his trial for driving under the influence of intoxicants.
>
> *The right to operate a motor vehicle on the highways of this State is not a property or unrestrained right, but a privilege which is subject to reasonable regulation under the police power of the State in the interest of public safety and welfare. Prichard* v. *Battle,* 178 Va. 455, 460, 17 S. E. 2d 393; 7 Am. Jur. 24, Automobiles and Highway Traffic, § 10, p. 603; 60 C.J.S., Motor Vehicles, § 146, p. 469.

The defense argues that the Virginia Statute giving the accused the right to take a blood test but subjecting him to a penalty if he "unreasonably refuses" to do so places the accused squarely between "the rock and the whirlpool." They argue that this, in effect, imposes illegal state conditions on constitutionally guaranteed rights. The above quoted language from the Virginia case of *Walton* v. *City of Roanoke* is a reply to this argument. Such argument has been made in other states and rejected for the same reasons cited by our Virginia Court—E.g., *Prucha* v. *Dept. Motor Vehicles,* 110 N. W. 2d 75 (Nebraska); *Lee* v. *State,* 358 P. 2d 765 (Kansas); *State* v. *Bock,* 328 P. 2d 1065 (Idaho).

Under § 8-67.1 of the Virginia Code, as amended, a non-resident motor vehicle operator using the highways of this state is deemed to have appointed the Commissioner of Motor Vehicles of Virginia as his statutory agent for service of process in the event of a claim against him arising out of an accident in this state. After having been served with process in this manner, he may be subjected to a personal judgment against him although he resides outside the state. This, too, is a condition which our Legislature and most other states have imposed on use of their highways. The validity of such statutes is not now seriously questioned.

CONCLUSION

For the reasons heretofore given, I will overrule the motion to set aside the jury's verdict and enter judgment thereon. While I do not feel that any of the accused's constitutional rights were violated, I am also mindful of paragraph (i) of § 18.1-55.1 (the 1964 Virginia Statute) which provides that the court shall, "regardless of the result of the blood test or tests, if any, consider such other relevant evidence of the condition of the accused as shall be admissible in evidence". In my opinion, the evidence here, aside from the blood tests, was adequate to support the jury's findings.

A copy of this opinion has this day been mailed to all counsel of record, postage prepaid. The original of this opinion is being filed in the Clerk's Office with the other papers in this case.

9/26/67

/s/ WILLIAM W. SWEENEY
Judge

APPENDIX C

CONSTITUTION OF VIRGINIA

ARTICLE I, § 8.: CONCERNING CRIMINAL PROSECUTIONS GENERALLY.

That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers; *nor be compelled in any criminal proceeding to give evidence against himself,* nor be put twice in jeopardy for the same offense. (Emphasis Added).

****
****

VIRGINIA STATUTES

EXCERPTS:

VA. CODE ANN. § 8-67.1 (CUM. SUPP. 1966): SERVICE ON COMMISSIONER OF MOTOR VEHICLES AS AGENT OF NONRESIDENT MOTOR VEHICLE OPERATOR.

****

Such nonresident operator of a motor vehicle which is involved in an accident or collision in this

Commonwealth shall likewise be deemed to have consented that the appointment of the Commissioner of the Division of Motor Vehicles or his successors in office, as the true and lawful attorney of such nonresident upon whom may be served all lawful process and notice pursuant to the provisions of law pertaining thereto, shall be irrevocable and binding upon the executor, administrator or other personal representative of such nonresident. * * *

****

VA. CODE ANN. § 18.1-54 (REPL. VOL. 1960)): DRIVING AUTOMOBILES, ENGINES, ETC., WHILE INTOXICATED.

It shall be unlawful for any person to drive or operate any automobile or other motor vehicle, car, truck, engine or train while under the influence of alcohol, brandy, rum, whisky, gin, wine, beer, lager beer, ale, porter, stout or any other liquid beverage or article containing alcohol or while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature.

VA. CODE ANN. § 18.1-55 (CUM. SUPP. 1966): USE OF CHEMICAL TEST TO DETERMINE ALCOHOL IN BLOOD; PROCEDURE; QUALIFICATIONS AND LIABILITY OF PERSON WITHDRAWING BLOOD; COSTS; EVIDENCE;; SUSPENSION OF LICENSE FOR REFUSAL TO SUBMIT TO TEST; LOCALITIES AUTHORIZED TO ADOPT PARALLEL PROVISIONS.

(a) As used in this section "license" means any operator's, chauffeur's or learner's permit or license authorizing the operation of a motor vehicle upon the highways.

(b) Any person whether licensed by Vriginia or not, who operates a motor vehicle upon a public highway in this State on and after July one, nineteen hundred sixty-four, shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood taken for a chemical test to determine the alcoholic content thereof, if such person is arrested for a violation of § 18.1-54 or of a similar ordinance of any county, city or town within two hours of the alleged offense.

(c) If a person after being arrested for a violation of § 18.1-54 or of a similar ordinance of any county, city or town and after having been advised by the arresting officer that a person who operates a motor vehicle upon a public highway in this State shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood taken for a chemical test to determine the alcoholic content thereof, and that the unreasonale refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of this State, then refuses to permit the taking of a sample of his blood for such tests, the arresting officer shall take the person arrested before a committing magistrate and if he does again so refuse after having been further advised by such magistrate of the law requiring a blood test to be taken and the penalty for refusal, and so declares again his refusal in writing upon a form provided by the Chief Medical Examiner of Virginia (hereinafter referred to as Chief Medical Examiner)), or refuses or fails to so declare in writing and such fact is certified as prescribed in paragraph (j), then no blood sample shall be taken even though he may thereafter request same.

(d) Only a physician, registered professional nurse, graduate laboratory technician or a technician

or nurse designated by order of a court of record acting upon the recommendation of a licensed physician, using soap and water to cleanse the part of the body from which the blood is taken and using instruments sterilized by the accepted steam sterilizer or some other sterilizer which will not affect the accuracy of the test, or using chemically clean sterile disposable syringes, shall withdraw blood for the purpose of determining the alcoholic content thereof. No civil liability shall attach to any person authorized to withdraw blood as provided herein as a result of the act of withdrawing blood from any person submitting thereto, provided the blood was withdrawn according to recognized medical procedures; and provided further that the foreging shall not relieve any such person from liability for negligence in the withdrawing of any blood sample.

(d1) Portions of the blood sample so withdrawn shall be placed in each of two vials provided by the Chief Medical Examiner, which vials shall be sealed and labeled by the person taking the sample or at his direction, showing on each the name of the accused, the name of the person taking the blood sample, and the date and time the blood sample was taken. The vials shall be placed in two containers provided by the Chief Medical Examiner, which containers shall be sealed so as not to allow tampering wit hthe contents. The arresting or accompanying officer shall take possession of the two containers holding the vials as soon as the vials are placed in such containers and sealed, and shall transport or mail one of the vials forthwith to the Chief Medical Examiner. The officer taking possession of the other container (hereinafter referred to as second container) shall, immediately after taking possession of said second container give to the accused a form provided by the Chief Medical Examiner which

shall set forth the procedure to obtain an independent analysis of the blood in the second container, and a list of those laboratories and their addresses, approved by the State Health Commissioner; such form shall contain a space for the accused or his counsel to direct the officer possessing such second container to forward that container to such approved laboratory for analysis, if desired. The officer having the second container, after delivery of the form referred to in the preceding sentence (unless at that time directed by the accused in writing on such form to forward the second container to an approved laboratory of the accused's choice, in which event the officer shall do so) shall deliver said second container to the chief police officer of the county, city or town in which the case will be heard, and the chief police officer who receives the same shall keep it in his possession for a period of seventy-two (72) hours, during which time the accused or his counsel may, in writing, on the form provided hereinabove, direct the chief police officer having possession of the second container to mail it to the laboratory of the accused's choice chosen from the approved list. As used in this section, the term "chief police officer" shall mean the sheriff in any county not having a chief of police, the chief of police of any county having a chief of police, the chief of police of the city or the sergeant or chief of police of the town in which the charge will be heard.

(d2) The testing of the contents of the second container shall be made in the same manner . . .

(d3) * * *

(d4) * * *

(e) Upon receipt of the blood sample forwarded to his office for analysis, the Chief Medical Examiner shall cause it to be examined for alcoholic content and he or an Assistant Chief Medical Examiner shall execute a certificate which shall indicate the name of the accused, the date, time and by whom the blood sample was received and examined, a statement that the container seal had not been broken or otherwise tampered with, a statement that the container was one provided by the Chief Medical Examiner and a statement of the alcoholic content of the sample. The certificate attached to the vial from which the blood sample examined was taken shall be returned to the clerk of the court in which the charge will be heard. The certificate attached to the container forwarded on behalf of the accused shall also be returned to the clerk of the court in which the charge will be heard, and such certificate shall be admissible in evidence when attested by the pathologist or by the supervisor of the laboratory approved by the State Health Commissioner.

(f) When any blood sample taken in accordance with the provisions of this section is forwarded for analysis to the office of the Chief Medical Examiner, a report of the results of such analysis shall be made and filed in that office. Upon proper identification of the vial into which the blood sample was placed, the certificate as provided for in this section shall, when duly attested by the Chief Medical Examiner, or any Assistant Chief Medical Examiner, be admissible in any court, in any criminal proceeding, as evidence of the facts therein stated and of the results of such analysis.

(g) Upon the request of the person whose blood sample was taken for a chemical test to determine

the alcoholic content thereof, the results of such test or tests shall be made available to him.

(h) * * *

(i) In any trial for a violation of § 18.1-54 of the Code or of a similar ordinance of any county, city or town, this section shall not otherwise limit the introduction of any relevant evidence bearing upon any question at issue before the court, and the court shall, regardless of the result of the blood test or tests, if any, consider such other relevant evidence of the condition of the accused as shall be admissible in evidence. The failure of an accused to permit a sample of his blood to be withdrawn for a chemical test to determine the alcoholic content thereof is not evidence and shall not be subject to comment at the trial of the case; nor shall the fact that a blood test had been offered the accused be evidence or the subject of comment.

(j) The form referred to in paragraph (c) shall contain a brief statement of the law requiring the taking of a blood sample and the penalty for refusal, a declaration of refusal and lines for the signature of the person from whom the blood sample is sought, the date and the signature of a witness to the signing. If such person refuses or fails to execute such declaration, the committing justice, clerk or assistant clerk shall certify such fact, and that the committing justice, clerk or assistant clerk advised the person arrested that such refusal or failure, if found to be unreasonable, constitutes grounds for the revocation of such person's license to drive. The committing or issuing justice, clerk or assistant clerk shall forthwith issue a warrant charging the person refusing to take the test to determine the alcoholic content of his blood, with

violation of this section. The warrant shall be executed in the same manner as criminal warrants.

(k) The executed declaration of refusal or the certificate of the committing justice, as the case may be, shall be attached to the warrant and shall be forwarded by the committing justice, clerk or assistant clerk to the court in which the offense of driving under the influence of intoxicants shall be tried.

(l) When the court receives the declaration of refusal or certificate referred to in paragraph (k) together with the warrant charging the defendant with refusing to submit to haveing a sample of his blood taken for the determination of the alcoholic content thereof, the court shall fix a date for the trial of said warrant, at such time as the court shall designate, but subsequent to the defendant's criminal trial for driving under the influence of intoxicants.

(m) The declaration of refusal or certificate under paragraph (k), as the case may be, shall be *prima facie* evidence that the defendant refused to submit to the taking of a sample of his blood to determine the alcoholic content thereof as provided hereinabove. However, this shall not be deemed to prohibit the defendant from introducing on his behalf evidence of the basis for his refusal to submit to the taking of a sample of his blood to determine the alcoholic content thereof. The court shall determine the reasonableness of such refusal. (Emphasis Added).

(n) If the court shall find the defendant guilty as charged in the warrant, the the court shall suspend the defendant's license for a period of 90 days for a first offense and for six months for a second or

subsequent offense or refusal within one year of the first or other such refusals; the time shall be computed as follows: The date of the first offense and the date of the second or subsequent offense.

(o) * * *

(p) * * *

(q) * * *

(r) The court or the jury trying the case shall determine the innocence or the guilt of the defendant from all the evidence concerning his condition at the time of the alleged offense.

(s) The steps herein set forth relating to the taking, handling, identification, and disposition of blood samples are procedural in nature and not substantive. Substantial compliance therewith shall be deemed to be sufficient. Failure to comply with any one or more of such steps or portions thereof, or a variance in the results of the two blood tests shall not of itself be grounds for finding the defendant not guilty, but shall go to the weight of the evidence and shall be considered as set forth above with all the evidence in the case, provided that the defendant shall have the right to introduce evidence on his own behalf to show noncompliance with the aforesaid procedure or any part thereof, and that as a result his rights were prejudiced.

(t) * * *

VA. CODE ANN. § 18.1-59 (CUM. SUPP. 1966): SAME; FORFEITURE OF DRIVER'S LICENSE; SUSPENSION OF SENTENCE.

The judgment of conviction, or finding of not innocent in the case of a juvenile, if for a first offense under § 18.1-54, or for a similar offense under any county, city or town ordinance, shall of itself operate to deprive the person so convicted or found not innocent of the right to drive or operate any such vehicle, conveyance, engine or train in this State for a period of one year from the date of such judgment, and if for a second or other subsequent offense within ten years thereof for a period of three years from the date of the judgment of conviction or finding of not innocent thereof, any such period in either case to run consecutively with any period of suspension for failure to permit a blood sample to be taken as required by § 18.1-55.1. If any person has heretofore been convicted or found not innocent of violating any similar act of this State and thereafter is convicted or found not innocent of violating the provisions of § 18.1-54, such conviction or finding shall for the purpose of this section and § 18.1-58 be a subsequent offense and shall be punished accordingly; and the court may, in its discretion, suspend the sentence during the good behavior of the person convicted or found not innocent.

VA. CODE ANN. § 19.1-83 (REPL. VOL. 1960): WHEN SEARCH WARRANT MAY ISSUE FOR PROPERTY STOLEN, ETC.

If there be complaint on oath, supported by the affidavit required by § 19.1-85, that personal property has been stolen, embezzled, or obtained by false pretenses, and that it is believed to be concealed in a particular house or other place, a justice of the peace, or a judge of any court having jurisdiction of the trial of criminal cases to whom complaint is made, if satisfied that there is reasonable

cause for such search, shall issue a warrant to search such place for the property.

VA. CODE ANN. § 19.1-90 (REPL. VOL. 1960): WHO MAY ISSUE PROCESS OF ARREST.

Process for the arrest of a person charged with a criminal offense may be issued by:

(1) The judge, in vacation as well as in term, or clerk of any circuit or corporation court exercising criminal jurisdiction; or

(2) The judge, or clerk of any county or municipal court exercising criminal jurisdiction; or

(3) The judge of any juvenile and domestic relations court; or

(4) Any police justice as defined by § 16.1-70; or

(5) Any justice of the peace, unless otherwise provided by law; or

(6) Any other person so authorized by statute.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

ARTHUR *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 501. Decided November 25, 1968.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.